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No. 08-305

IN THE

Supreme Court of the United States

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AUTISM SPEAKS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

Amicus curiae Autism Speaks is the world's largest not-for-profit organization dedicated to autism research, education, and treatment. It has chapters across the United States, Canada, and the United Kingdom, and works with federal, state, and local governments, as well as the U.S. military, to meet the treatment and educational needs of the ever-growing population of children diagnosed with autism. *Amicus*'s experience allows it to elucidate the unique educational challenges that children with autism face and the effect the Court's decision will have on thousands of American families.[1]

[1] No part of this brief was authored by counsel for any party. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. All parties have consented to this filing.

PRELIMINARY STATEMENT

We learn geology the morning after the earthquake, on ghastly diagrams of cloven mountains, up-heaved plains, and the dry bed of the sea.

— Ralph Waldo Emerson, Considerations by the Way, in The Conduct of Life 1088 (1860)

One in 150 children born today will be diagnosed with autism, a disability universally recognized as a pervasive developmental disorder that is amenable to remediation only with intensive and early intervention. Parents cannot let a child with autism languish in the wrong educational program when every passing moment means losing developmental opportunities that can never be regained. Early, intensive educational intervention is thus the only hope for salvaging an autistic child's future. Almost all such children will benefit from the right mix and intensity of services, and many who receive them will be able to join regular classrooms and go on to enjoy independent and productive lives. But the opportunity to help an autistic child with effective programming begins to dwindle at age three. The damage to the child's development if this opportunity is not seized with appropriate and effective programming can never be undone in many cases, so when educational bureaucracies dither or delay or place a child in an inappropriate program, the time lost can mean a life wasted—for the sake of the affected child and his or her family, parents and educators cannot afford to learn geology the morning after the earthquake. There are no second chances.

For more than twenty years, the Individuals with Disabilities Education Act (IDEA) and its predecessor statutes have given courts equitable discretion to

grant "such relief as the court determines is appropriate" when reviewing a school district's treatment of a child with a disability. 20 U.S.C. § 1415(i)(2)(C). In *School Committee of Burlington* v. *Department of Education of Massachusetts*, 471 U.S. 359 (1985), and again in *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), this Court held that this grant of equitable authority allows a court to order reimbursement when parents of a learning-disabled child reject a school district's inappropriate placement and then secure and pay for appropriate services themselves.

This remedy is particularly important to the parents of children with autism, because of the early intervention required to treat it. In order to ensure that their children receive appropriate education when they need it, parents of autistic children must sometimes act quickly by placing a child in an effective program rather than wade through a bureaucratic thicket beforehand. This is especially true because autism frequently goes undiagnosed until a child is school-aged, meaning that time is even more of the essence.

And the right to seek reimbursement is further important because autism is being diagnosed at higher and higher rates and demand for effective programming is often outstripping the resources that local governments will dedicate to the problem.

One in 150 children born in the United States will be diagnosed with autism, making it more common among children than Down syndrome, diabetes, cystic fibrosis, and cancer. Autistic children now make up the fastest-growing segment of the population served under the IDEA. And in part because of this growth, there is a nationwide shortage of per-

sonnel with the training necessary to properly educate autistic children, and a corresponding shortage of effective programs. School systems thus often cannot provide—or resist providing—appropriate and effective programs. For parents who live in districts that lack the right programs and which therefore cannot possibly offer an appropriate and effective education to an autistic child, being made to try out an inappropriate placement while the student languishes is a situation that no parent should be required to endure.

This case is only about parents having the right to seek reimbursement. Nothing in the Act requires a court to grant that reimbursement unless the parents prove to the court (see *Schaffer* v. *Weast*, 546 U.S. 49 (2005)) "both that the public placement violated IDEA and that the private school placement was proper under the Act" (*Carter*, 510 U.S., at 15). But where parents place a disabled child in a private program because they are correct in their assessment that the school system has failed to provide an appropriate education, they must have the right to seek reimbursement if the Act is to achieve its "most fundamental" mandate: "the provision of a free appropriate public education to a child with a disability." *Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2004 (2007).

ARGUMENT

I. A FALSE START CAN BE DEVASTATING TO AN AUTISTIC CHILD, BECAUSE IN MANY CASES EARLY INTERVENTION IS THE ONLY HOPE FOR AMELIORATING THE SYMPTOMS OF AUTISM

The main symptoms of autism are impaired communication, impaired social function, and repetitive, stereotyped behaviors. Forty percent of children with autism do not talk, and others have difficulty learning to use language for communicative purposes. S. Rep. No. 109-318 (2006), at 2; Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, at 70 (4th ed. 2000) ("DSM-IV-TR"). Most children with autism find it difficult to relate to and socialize with other people. DSM-IV-TR, at 70. For example, autistic children generally have "little to no interest in establishing friendships" and often "fail[] to develop peer relationships." *Ibid.* Those who are interested in friendship often cannot grasp the "conventions of social interaction," have little sense of other people's boundaries, intrude inappropriately in social interaction, and cannot perform basic interpersonal tasks like pointing out objects they find interesting. *Ibid.* Many display a restricted range of interests and are often preoccupied with one narrow interest, such as dates, phone numbers, or radio station call letters. *Ibid.* They depend on predictability and have trouble coping with unexpected changes to their routine: trivial changes like rearranging furniture or changing the dinner silverware can spark a catastrophic reaction. S. Rep. No. 109-318, at 3; DSM-IV-TR, at 71. Children with these

symptoms derive little benefit from ordinary educational classrooms.

Education is the primary and only demonstrably effective treatment for autism.[2] There is "abundant scientific evidence," confirmed by "virtually every study" in the last two decades, that early, intensive instruction in a specially designed remedial program can produce "dramatic improvements for children with autism." Gina Green, Early Behavioral Intervention for Autism, in Behavioral Intervention for Young Children With Autism: A Manual for Parents and Professionals 29, 38 (Catherine Maurice et al. eds., 1996).

One study, for example, found that 13-year-olds who had received early, intensive intervention in younger life scored 30 points higher on an IQ test than a control group. See John J. McEachin *et al.*, Long-Term Outcome For Children With Autism Who Received Early Intensive Behavioral Treatment, 97 Am. J. Ment. Retard. 359, 367-68 (1993). Another found that a single year of early intensive education produced 19-point gains on IQ tests later in life. See

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[2] See Comm. on Educ. Interventions for Children with Autism (CEICA), Nat'l Research Council (NRC), Educating Children with Autism 12 (2001) ("Education * * * is currently the primary form of treatment in autism."); Green, at 29 (whereas the effectiveness of early, intensive instruction in treating autism has repeatedly been shown, "[n]o other treatment for autism offers comparable evidence of effectiveness.") (citations omitted); Smith & Lovaas, at 68 (educational approaches to the treatment of autism have been empirically validated, but biomedical interventions "appear to do little to alter the outcomes of individuals with autism."); Lovaas, at 3 ("Medically and psychodynamically oriented therapies have not proven effective in altering outcomes.").

Sandra L. Harris *et al.*, Changes In Cognitive And Language Functioning Of Preschool Children With Autism, 21 J. Autism Dev. Disord. 281, 287 (1991). A third concluded that nearly half of autistic children who received the intervention went on to succeed in public school and achieve normal IQ scores, compared with 2% of a control group who did so. See O. Ivar Lovaas, Behavioral Treatment And Normal Educational And Intellectual Functioning In Young Autistic Children, 55 J. Consult. & Clin. Psychol. 3, 7-9 (1987); see also Tristram Smith *et al.*, Intensive Behavioral Treatment For Preschoolers With Severe Mental Retardation And Pervasive Developmental Disorder, 102 Am. J. Ment. Retard. 238, 246-47 (1997) (similar). Overall, early intensive intervention leads to "successful integration in regular schools for many" and "completely normal functioning for some." Green, at 29 (emphasis removed). The alternative may be lifelong dependency, including institutional care that can cost $300,000 per year. Effective programming can usually avoid that result.

But for educational intervention to offer meaningful assistance, it must come early, as the National Institutes of Health, the National Institute of Mental Health, the National Research Council, and the American Academy of Pediatrics all recognize.[3] Con-

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[3] See Nat'l Inst. of Health, HHS, Autism Spectrum Disorders: Pervasive Developmental Disorders 17 (2007) ("One point that most professionals agree on is that early intervention is important."); Nat'l Inst. of Mental Health, HHS, Report to Congress on Autism (2006) ("Early intervention is critical for affected children to gain maximum benefit from current therapies."); CEICA, at 6 (NRC committee "recommends that educational services begin as soon as a child is suspected of having an autistic spectrum disorder."); American Academy of Pediatrics

gress likewise has emphasized that "children with autism spectrum disorder identified early and enrolled in early intervention programs show significant improvements in their language, cognitive, social, and motor skills, as well as in their future educational attainment and decreased needs for special education services." S. Rep. No. 109-318, at 10. Intervention "should begin as soon as possible, preferably in the preschool years, because young children have not yet fallen as far behind their typically developing peers and may have more neurologic plasticity than older children." Tristram Smith & O. Ivar Lovaas, Intensive And Early Behavioral Intervention With Autism: The UCLA Young Autism Project, 10 Infants & Young Children 67, at 68-69 (1998). During this period "the young, developing brain is very modifiable" (Green, at 39), and "rigorous behavioral therapy modifies the neural circuitry before the condition becomes permanent" (Lynn M. Hamilton, Facing Autism 92 (2000) (citations omitted)). As the child grows older, he or she will "have a far more difficult time learning the skills that he needs to function in life." *J.H.* v. *Henrico County Sch. Bd.*, 326 F.3d 560, 565 (CA4 2003).

And time is especially precious because autism is often diagnosed late. Though symptoms usually manifest by age three, and are sometimes evident almost from birth, they are often overlooked or mistaken for emotional disturbance, mental retardation or deafness. See S. Rep. No. 109-318, at 3, 9; Autism

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Committee on Children With Disabilities, Technical Report: The Pediatrician's Role in the Diagnosis and Management of Autistic Spectrum Disorder in Children, 107:5 Pediatrics 85 (May 2001).

Spectrum Disorder Expert Working Group, Interagency Autism Coordinating Committee, National Institute of Mental Health, HHS, Autism Spectrum Disorders Roadmap 8 (May 16, 2005) ("Roadmap"). The median age of diagnosis is between 52 and 56 months nationwide and up to 66 months in some areas, meaning that half of autistic children are not diagnosed until they are nearly 5 years old or more. Catherine Rice, Prevalence of Autism Spectrum Disorders: Autism and Developmental Disabilities Monitoring Network, Six Sites, United States, 2000, 56 Morbidity and Mortality Weekly Review SS-1, at 1 (Feb. 9, 2007); Catherine Rice, Prevalence of Autism Spectrum Disorders—Autism and Developmental Disabilities Monitoring Network, 14 Sites, United States, 2002, 56 Morbidity & Mortality Weekly Report SS-1, at 20 (Feb. 9, 2007) ("CDC 14 Sites Study"). Most children with autism, therefore, will already have wasted some of the most valuable treatment time in an inappropriate classroom setting before they are even diagnosed. See S. Rep. No. 109-318, at 3, 9; Roadmap, at 8.

II. MANY PUBLIC SCHOOLS ARE UNABLE TO COPE WITH AUTISM'S GROWING PREVALENCE AND CANNOT PROVIDE APPROPRIATE EDUCATIONAL SERVICES TO AUTISTIC STUDENTS

In recent years, the incidence of autism has grown dramatically. Fifty years ago, "[i]nfantile autism" was considered "a relatively rare form of schizophrenia" that was "not important from an epidemiological point of view." C.B. Ferster, Positive Reinforcement and Behavioral Deficits of Autistic Children, 32 Child Development 437, 437 (1961). In

1993, DOE had identified autism in only 19,058 children between 6 and 21. 2 Office of Special Educ. and Rehabilitative Servs., DOE (OSERS), 26th Annual (2004) Report to Congress on the Implementation of the Individuals with Disabilities Education Act 25 (2006).[4] But in 2007, DOE reported more than a quarter of a million autistic students between the ages of 6 and 21—the number had jumped by a factor of fourteen in as many years. OSERS, Data Analysis System, 1976-2007, Table 1-3.[5] The Centers for Disease Control report rates as high as 1 in every 150 children. CDC 14 Sites Study, at 12. With some 24,000 children with autism born each year (S. Rep. No. 109-318, at 3 (2006)), autism spectrum disorder is now more common among children than Down syndrome, diabetes, cancer, cystic fibrosis, hemophilia, and sickle cell disease.[6]

Properly educating each of these thousands of students requires trained personnel to apply specific, research-based educational methods in a properly designed program. Trained instructors must have mastered "applied behavior analysis, naturalistic learning, incidental teaching, assistive technology, socialization, communication, inclusion, adaptation of the environment, language interventions, assessment,

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[4] Online at http://www.ed.gov/about/reports/annual/osep/2004/26th-vol-2.pdf.

[5] Online at http://www.ideadata.org/tables31st/ar_1-3.htm.

[6] Figures available from the National Institutes of Health's National Human Genome Research Institute, online at http://www.genome.gov/10001204 (Down, cystic fibrosis, hemophilia, sickle cell disease), http://ndep.nih.gov/diabetes/youth/youth.htm (diabetes), and http://seer.cancer.gov/csr/1975_2004/results_merged/sect_28_childhood_cancer.pdf (cancer).

and the effective use of data collection systems." CEICA, at 184.

A program typically involves intensive small-group or one-on-one instruction for the equivalent of a full school day, five days a week, year round. *Id*., at 6. Instruction focuses on functional spontaneous communication, social instruction, cognitive development, play skills, and behavioral coaching. *Ibid*. Programs meeting these criteria and the personnel trained to implement them are in short supply all across the nation.

As to the programs, the National Institute of Mental Health's Autism Spectrum Disorder Expert Working Group has found that effective services "tend to be scattered, fragmented, and poorly coordinated," and that "even where services are available, public and private financing are often inadequate to meet the needs of most individuals with ASD [autism spectrum disorder] and their families." Roadmap, at 3. The Working Group found "a serious and persistent lack of adequate capacity to provide appropriate care for children, adolescents, youth, and adults with ASD." *Id.*, at 10.

As to the teachers, even when appropriate programs are available, the chronic shortage of special education teachers is particularly "serious in the growing field of autistic spectrum disorders." CEICA, at 184. Thus, "[i]t is possible that even a well designed special education program for a school district could still fall short of adequately providing for the special needs of children with autistic spectrum disorders." *Id.*, at 182. While some district's school systems do have adequately-staffed programs, many do not, and parents in these districts must look elsewhere to find appropriate services for their children.

See, *e.g.*, *A.K.* v. *Alexandria City Sch. Bd.*, 484 F.3d 672, 681-82 (CA4 2007) (no public school existed that could adequately meet the needs of a child with autism).

These shortages lead to school districts failing to provide appropriate services to autistic children in dramatic numbers. The CDC recently reported, for example, that as many as 38% of 8-year-old children with autism spectrum disorders were not receiving special education services in some locations, and that in many places, even where autistic children were offered some level of special education, the services offered had actually been designed to accommodate some other type of disorder (CDC, 14 Sites Study, at 19), making them non-individualized and useless. As a "pervasive developmental disorder," autism requires an equally pervasive plan of action.

In *amicus*'s experience advocating on behalf of autistic children and in supporting families affected by autism, it has encountered more than a thousand examples in which a school district, through lack of expertise, incompetence, mistake, or lack of will or funding, has proposed IEPs manifestly and demonstrably inappropriate for an autistic child. In one major urban school district alone, parents affiliated with *amicus* have grappled with the following:

- An autistic student confined to a wheelchair whose IEP would have placed him in a building that was not wheelchair-accessible;
- An autistic student who was recommended into a school for the deaf;
- An autistic student just six years old who was recommended into a class for adolescents;

- An autistic student who was recommended for a classroom of "emotionally disturbed" students;
- An autistic student capable of only "word approximations" whose IEP did not include instruction in speech and language;
- An autistic student whom the school district concluded needed year-round services but whose IEP would have placed him in a school that was closed for two months each year; and
- An autistic student with severe motor function deficits, including, *e.g.*, "toe walking," whose IEP not only offered no physical or occupational therapy but in fact recommended that he participate in only regular physical education class.

Cases from around the country confirm that these examples from *amicus*'s experience are representative of problems nationwide and further illustrate the myriad ways in which even the best-intentioned school district may nevertheless fail an autistic child. The school district may, for example, simply fail to recognize a child's disability.[7] Or, it may fail to timely develop an individualized education plan.[8] Or,

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[7] See, *e.g.*, *Bd. of Educ. of Montgomery County* v. *S.G.*, No. 06-1411, 2007 WL 1213213, at *3-4 (CA4 Apr. 25, 2007); *Scott* v. *Dist. of Columbia*, No. 03-1672, 2006 WL 1102839, at *7-9 (D.D.C. Mar. 31, 2006); *Greenwich Bd. of Educ.* v. *Torok*, No. 03-cv-1407, 2003 WL 22429016, at *1 (D. Conn. Oct. 23, 2003).

[8] See, *e.g.*, *Gadsby* v. *Grasmick*, 109 F.3d 940, 945 (CA4 1997); *Gabel* v. *Bd. of Educ. of Hyde Park Cent. Sch. Dist.*, 368 F. Supp. 2d 313, 321 (S.D.N.Y. 2005); *Solomon-Lane* v. *Dist. of*

it may go through the motions of developing an individualized education plan while in reality deciding beforehand not to offer the needed services.[9] Or it may simply misdesign the student's educational plan so that it becomes ineffective and doomed to failure.[10] The overall picture is of a system that, more than it should, fails to provide appropriate education for students who need that education at the earliest possible age if they are ever to live independent and productive lives. With thousands of children newly diagnosed with autism each year, the problem will likely worsen.

III. CONGRESS DID NOT INTEND TO FORCE PARENTS TO CHOOSE BETWEEN SACRIFICING THEIR CHILD'S DEVELOPMENT OR SACRIFICING THEIR RIGHT TO A FREE EDUCATION

In 1997, Congress amended IDEA to give hearing officers and courts explicit statutory authority to grant reimbursement when students who have previously received special services are placed in private schools and the factfinder determines that the school district failed to offer a free appropriate public education in a timely manner. 20 U.S.C. §

Columbia, No. 99-cv-2404, 2005 WL 736533, at *1 (D.D.C. Mar. 31, 2005); *Justin G.* v. *Bd. of Educ. of Montgomery County*, 148 F. Supp. 2d 576, 583 (D. Md. 2001).

[9] See, *e.g.*, *Deal* v. *Hamilton County Bd. of Educ.*, 392 F.3d 840, 855-61 (CA6 2004); *W.G.* v. *Bd. of Trs.*, 960 F.2d 1479, 1481-1482, 1484-85 (CA9 1992); *Spielberg* v. *Henrico County Pub. Sch.*, 853 F.2d 256 (CA4 1988).

[10] See, *e.g.*, *D.L.* v. *Springfield Bd. of Educ.*, 536 F. Supp. 2d 534 (D.N.J. 2008); *L.B.* v. *Nebo Sch. Dist.*, 379 F.3d 966, 971-72 & 978 (CA10 2004); 20 U.S.C. § 1412(a)(5)(A).

1412(a)(10)(C)(ii). The statute provides a list of considerations to guide the decisionmaker's discretion. 20 U.S.C. § 1412(a)(10)(C)(iii)-(iv). Separately, the statute authorizes a court to grant "appropriate" relief (§ 1415(i)(2)(C)), which this Court has held allows reimbursement to further the purposes of the Act. *Sch. Comm. of Burlington* v. *Dep't of Educ. of Mass.*, 471 U.S. 359, 372 (1985).

In determining whether reimbursement is "appropriate" under this provision, "equitable considerations are relevant" (*id.*, at 374), and a court "must consider all relevant factors." *Florence County Sch. Dist. Four* v. *Carter*, 510 U.S. 7, 16 (1993). Presumably aware that this Court had long since approved ordering reimbursement under the language of § 1415 (see *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)), Congress did not alter that language when it adopted the new provisions of § 1412.

Petitioner and supporting *amici* suggest that despite leaving the language of § 1415's grant of equitable discretion unchanged, Congress implicitly changed its meaning when it provided explicit authority to grant reimbursement under some conditions. Reading the statute as petitioner suggests would have a devastating effect on thousands of autistic students and their families. With no opportunity to seek reimbursement, parents could either leave their child in an inappropriate placement, causing the child harm, or risk economic harm or even bankruptcy by placing the child in a private placement.

This Court should not abide that result because it contravenes the statute's own declared purpose as well as this Court's avowed concern for the welfare of children; because there is no indication that Congress

intended that result and every indication that it would abhor it; and because construing the statute as petitioner suggests would draw meaningless distinctions and thus harm a group of students with disabilities to no useful end.

A. Parents Must Have An Opportunity To Seek Reimbursement If The Act Is To Accomplish Its Fundamental Goal Of Providing A Free Appropriate Public Education To All Children

IDEA's "most fundamental" mandate is "the provision of a free appropriate public education to a child with a disability." *Winkelman*, 127 S. Ct., at 2004; 20 U.S.C. § 1400(d)(1). As the Act itself states, Congress intended IDEA to achieve this goal for "all" children. 20 U.S.C. § 1400(d)(1). This Court has consistently interpreted IDEA in light of its announced purpose. See *Winkelman*, 127 S. Ct. at 2004; *Carter*, 510 U.S., at 8; *Burlington*, 471 U.S., at 372.

Faced with failures like those just described (see *supra*, § II), parents must choose between accepting whatever inappropriate placement the school district offers and placing a child in a needed private program while a challenge to the school district's IEP is pending. Given the irreversible damage that failing to treat autism quickly can cause, in this situation a parent's only responsible option may be to place the autistic child in the private program. Where a parent is thus forced to reject the school district's proposed IEP in order to get her child an adequate education, the Act's goal of giving each child "both an appropriate education and a free one" (*Burlington*, 471 U.S., at 372) requires that the child's parent have the opportunity to seek reimbursement, so that if the par-

ent can prove that the school district violated its obligations under the Act, the district can be made to fund the child's program.

The conclusion that reimbursement is sometimes required in order to achieve the Act's purpose is confirmed by the experience of the trial courts and courts of appeals, which have found in numerous individual cases that because of a school district's failures, providing the free appropriate education the Act demands required ordering the district to reimburse the parents. See, *e.g.*, *supra*, nn.7-10 (citing cases). In each case, the prevailing parent had the burden of showing that reimbursement was called for. *Schaffer* v. *Weast*, 546 U.S. 49, at 62 (2005). And in each case, the court looked at the particular facts proven to it and held that providing reimbursement on those facts was required to accomplish the Act's purpose as to a particular autistic child.

These courts' practical experience adjudicating the facts of dozens upon dozens of autism-related reimbursement cases, and *amicus*'s own experience supporting families dealing with autism, suggest that the right to seek reimbursement is a vital backstop to ensure that children who would otherwise slip through the cracks really get the free and appropriate education promised them. Protecting this population of children is part of the Congressional purpose behind the Act. And Congress' concern for these children's well-being is in turn part of a larger American tradition of taking responsibility for young people. The undeniable truth that youth is not just "a chronological fact," but "a time and a condition of life when a person may be most susceptible to * * * psychological damage" (*Johnson* v. *Texas*, 509 U.S. 350, 367 (1993)) applies with all the greater force

where the child in question suffers from a disability that will be a lifelong impairment if not ameliorated. In the cases to which the Court's decision in this case will apply, the choice that the court will have to make for the child may be the stark one between a life of dependence, social isolation, perhaps incomprehension on the one hand, and a productive life in society on the other. "Our society would be less than true to its heritage if it lacked abiding concern" for this most vulnerable group of children. *Lee* v. *Weisman*, 505 U.S. 577, 598 (1992).

One day, the causes and "triggers" of autism will be ascertained. Until that day, effective intervention and remediation is the only viable approach. Given Congress's overarching goal and our traditional commitment to the welfare of children, Congress should not be imagined to have abandoned the current and future generations of autistic children to a life in the darkness. This is especially true because autism is now the fastest growing category of disability that public schools encounter, and Congress has repeatedly voiced, and voted, its own special concern for autistic children in particular. See Education of the Handicapped Act Amendments of 1990, Pub. L. 101-467, Title I, § 101, Title IX, § 901(b)(10) to (20), 104 Stat. 1103, 1142, 1143 (1990) (specifying autism as disability); Children's Health Act of 2000, Pub. L. 106-310, Title I, 114 Stat. 1101 (2000) (expanding autism research); Pub. L. 108-446, Title I, 118 Stat. 2647, 2677 & 2682 (2004) (supporting autism teacher training and program development); Combating Autism Act of 2006, Pub. L. 109-416, 120 Stat. 2821 (2006) (funding expanded autism research). The Congress that thus acted repeatedly to protect the rights of autistic children could not have intended, and would not approve, an interpretation of its stat-

ute that would have such a dire effect on those children.

B. The Competing Rationales Presented By Petitioner's Supporting *Amici* For Limiting Reimbursement To Students Who Have Previously Received Special Education Do Not Square With The Act, Are Not Supported By The Legislative History, And Would Lead To Harsh And Senseless Results

While broad policy considerations and the specific purpose of the Act both favor allowing reimbursement in any case where the facts demand it, no coherent purpose favors petitioner's proposed interpretation. Petitioner would deny the right to seek reimbursement to parents whose children have never before received special education, but petitioner does not explain why Congress would have wanted to distinguish between students who had and students who had not received special education beyond asserting generically that the provision reflects the "balance [Congress] struck between the competing interests at play." Brief for Petitioner (Pet'r Br.) 40. Petitioner thus suggests that Congress, hoping to save school districts some money, drew an arbitrary line between two classes of students.

The only evidence from the 1997 amendments' legislative history mustered to support petitioner's view, presented by petitioner's supporting *amici*, is neither on point nor of much weight. All that is cited on the topic of reimbursement is a letter, not from a member of Congress, but from a "national education organization" suggesting that the statute offers relief "in the area of reimbursements * * * ." Brief for the

Council of Great City Schools as *Amicus Curiae* (Council Br.) 13. That statement does not reflect Congress's intent, only at most a constituent's personal understanding of the revisions and perhaps only that constituent's self-interested effort to plant in the Congressional record the seeds of the very argument that petitioner makes here.

Beyond that, *amici* summon a single statement, from Congressman Michael Castle, that the Act makes "it harder for parents to unilaterally place a child in" a private placement. See *id.*, at 12-13. Congressman Castle was first of all speaking about placement, not reimbursement, so his comment is not germane. But even if he had been speaking about reimbursement, the comment of a single House member would say little about the will of the entire Congress, especially given that Congress as a whole spoke by voting to approve § 1400(d)(1), which announces the purpose of the Act. "[T]he primary function of statutory construction is to effectuate the intent of Congress, and that function cannot properly be discharged by reliance upon a statement of a single Congressman, in the face of * * * weighty countervailing considerations * * * ." *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Amicus City of New York also suggests that the legislative history supports reading § 1412 as an exclusive rather than alternative grant of authority to order reimbursement. See Brief for City of New York as *Amicus Curiae* (New York Br.) 15-23. But its only piece of evidence is an excerpt from a House Report merely summarizing § 1412's reimbursement provisions. See *id.*, at 19 (quoting H.R. Rep. No. 105-95, at 92). The quoted report nowhere says that Congress intended to narrow the authority that already existed

under the language of § 1415 or that the § 1412 remedy is meant to be exclusive. Because the report says only what the statute itself says, it adds nothing to the analysis of that statute.

The legislative history therefore does not reveal any Congressional intent to limit the threshold opportunity to seek reimbursement to parents of children who have been in special education at some point, no matter the equities of the case and no matter how egregious the violation. And since the language of § 1415 has already been found to allow reimbursement when the equities require it, the plain text of the statute does not require petitioner's result. That result should be avoided in the absence of some plausible Congressional goal that it might have furthered.

Petitioner's supporting *amici* do propose two further rationales for petitioner's proposed rule, but neither has support in the legislative history, neither can be squared with the statute's actual provisions, and neither is necessary given the factors that courts currently take into account in deciding whether to grant or deny reimbursement.

Amici first suggest that disallowing reimbursement will screen out parents who never intended to enroll in a public school, but they cite no evidence that the provision would in fact screen out such parents who, under petitioner's rule, could still place their children briefly in a public placement and then transfer them to a private school and seek to be reimbursed. See Council Br. 13-15; Brief for Nat'l Educ. Ass'n as *Amicus Curiae* (NEA Br.) 10-11. And the rule would also screen out many parents who did want a public education for their children. Because the rule is thus over- and underinclusive, it does not

fit the remedy that *amici* suggest it was trying to effect, undermining the suggestion that this was in fact Congress's goal. *Amici* furthermore offer no evidence that Congress faulted the way the courts currently handle such parents—and in fact cite extensive evidence that courts already routinely deny reimbursement to such parents. See Council Br. 28 (citing five cases denying reimbursement).[11] The fact that current judicial practice already screens out parents who were "uninterested in an appropriate education in the public schools" (NEA Br. 11), taken with the fact that Congress's statute would poorly fit that goal, suggests that preventing abusive claims was not what Congress had in mind.

Amici also suggest that petitioner's rule is consistent with IDEA's purpose because IDEA is intended to promote cooperation between parents and public authorities in developing an educational plan and so it makes sense to require parents to give a public placement "a chance to work" before rejecting it.

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[11] The Senate and House Reports indicate that some of the provisions in the 1997 amendments were intended to "resolve" several issues that had been subject to litigation, specifically, "first," the proportion of funds that must be spent on private education; "second," whether providing funds to parochial schools was acceptable; and "third," the scope of the state's "child find" obligations. S. Rep. No. 105-17, at 13; H.R. Rep. No. 105-95, at 92. The reports discuss reimbursement obligations in a following paragraph that does not discuss "resolv[ing]" litigation issues, presumably because after *Burlington* there was no question remaining to resolve. One *amicus*'s suggestion that Congress enacted the 1997 amendments to address the 1985 and 1993 decisions in *Burlington* and *Carter* is therefore not supported by the reports on which *amicus* relies. Contra Council Br. 8 n.4 (citing S. Rep. No. 105-17, at 13; H.R. Rep. 105-95, at 92-93).

Council Br. 15; see also Brief for Nat'l Sch. Bds. Ass'n *et al.* as *Amici Curiae* (NSBA Br.) 7.

As an initial matter, this "give it a chance" theory does not describe the statute, because in a variety of common circumstances, a student will be eligible to seek reimbursement even though she has never given a particular proposed placement a trial run. This may happen when the child has earlier been misdiagnosed and given a placement under that wrong diagnosis: an autistic student, for example, who earlier mistakenly received services for deaf students would be eligible for reimbursement despite never having tried out the school's services for autistic students. It will also happen when a child receives special education services in one district and then moves to another, or where a child who received services from a school for younger children matriculates into an older school that makes different programs available. By the same token, petitioner's check-the-box rule would be satisfied if a child received services even for a short time and so does not in fact require a child to have tested out a placement.[12]

But even if the Council were correct that § 1412 expressed a preference for parents giving a particular placement a "chance," that section should not be read to limit the general power under § 1415 to order reimbursement when equity so demands, because read-

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[12] One *amicus* would read "previously received" to mean that a child had to be in a placement for the time "necessary to assess the adequacy of the plan in practice" (Council Br. 16 & n.7), but the statute contains no such requirement. *Amicus*'s insistence elsewhere that the statute be read according to its "plain language" (*id.*, at 11) is at odds with its assertion that "previously received" means anything other than what it says.

ing the provisions in that way would lead to results that are both senseless and harsh. See, *e.g.*, *United States* v. *Am. Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (Court will follow purpose of statute to avoid results that are either absurd or "plainly at variance with the policy of the legislation as a whole") (quoting *Ozawa* v. *United States*, 260 U.S. 178 (1922)); see also *Nixon* v. *Missouri Mun. League*, 541 U.S. 125, 138 (2004); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994).

Most strikingly, petitioner, borrowing a page from Kafka, would deny parents reimbursement for failing to try out a placement even when the school has offered no public placement for the child to try—as when the school district fails to recognize the child's disability (see *supra*, n.7, citing cases) or simply fails to offer an IEP (see *supra*, n.8, citing cases). Petitioner would similarly deny parents the right to seek reimbursement where a district's IEP process is so irretrievably broken that no one could expect it to figure out what to do with a child with special needs (see *supra*, n.9, citing cases; see also *W.G.* v. *Board. of Trustees*, 960 F.2d 1479, 1481-1482, 1484-85 (CA9 1992)); or where the district's proposed IEP would itself violate a provision of the Act (see *D.L.*, 536 F. Supp. 2d, at 538-39). And it would deny the right to seek reimbursement even when a district *concedes* that its proposed placement is inappropriate. See, *e.g.*, *Frank G.* v. *Bd. of Educ. of Hyde Park*, 459 F.3d 356, 361 (CA2 2006). In these situations, the problem is not a lack of cooperation between parent and school, but a one-side failure of the school district. A court considering the equities should have the power to make a parent whole in these extreme situations.

Of course it is entirely true, as petitioner and *amici* suggest, that when a student or parent brings suit, school districts are presumed in that particular case to have acted in good faith. See Pet'r Br. 39; Council Br. 14; NSBA Br. 18; Brief for U.S. Conference of Mayors *et al.* as *Amici Curiae* (Mayors' Br.) 4; *Schaffer*, 546 U.S., at 62; *id.*, at 62-63 (STEVENS, J., concurring). But that presumption in individual cases does not require pretending that school districts act appropriately in every case and interpreting the statute as if that were true—as it is demonstrably not. See *Bernardsville Bd. of Educ.* v. *J.H.*, 42 F.3d 149, 156 (CA3 1994) ("[t]he record bespeaks an appalling failure on the part of the education bureaucracy to develop and implement an appropriate IEP"); see also *supra*, n.9 (citing *Deal* and *Spielberg*, in which the school district impermissibly predetermined the outcome of IEP process). The statute should be interpreted to take into account school districts' infrequent but inevitable failures. Indeed, in addition to allowing courts to make parents whole in particular cases, the possibility of a reimbursement order exerts an important corrective pressure to keep the rare rogue school district from acting in bad faith.

Furthermore, adopting the Council's give-it-a-chance rule would be especially dangerous as applied to children with autism. For some students with some disabilities, developing an appropriate individualized placement might require trial and error, so if a school district proposes something that might be acceptable, it would make sense to "assess the placement in practice." Council Br. 15; see also NSBA Br. 12-13. But the requirements of programs for children with autism have already been rigorously "assess[ed] in practice" using scientific methods (see

generally CEICA), and a program that does not meet the requisite standards is worse than useless.

Making a child suffer through a trial-and-error period will be pointless where the initially proposed IEP is fundamentally deficient (as when a program for the deaf is recommended to a student who is not deaf), and will be disastrous if the child is autistic and so wastes the critical developmental window "assess[ing] in practice" a program that has no chance of reaching her. See *D.L.*, 536 F. Supp. 2d, at 543 (making autistic child try out placement which violated the Act will be "useless and potentially counterproductive exercise" (quoting *Frank G.*, 459 F.3d, at 372)). When a parent avoids a demonstrably harmful program in these circumstances, that parent must in fairness have at least the opportunity to prove that she is entitled to relief.[13]

Finally, the current regime already encourages exactly the kind of cooperative development that the Council says petitioner's rule would also encourage, because the courts grant reimbursement according to equitable principles, and will deny reimbursement

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[13] For the same reason, a categorical bar to ordering reimbursement when parents have not "work[ed] with" the school district before placing their child in a pubic school would harm children in some cases, and there is no reason to limit the courts' discretion in this way. See NEA Br. 12 (proposing prudential limit to equitable discretion). Of course parents should work with the school district when it is reasonable to do so, as the courts have recognized. See, *e.g.*, *Patricia P.*, 203 F.3d, at 468. But where taking the time to "work with" a school district that has already failed to propose an appropriate placement would put a child's development in jeopardy, a court should be allowed to consider that fact in determining whether a parent deserves reimbursement.

where, for example, a parent has failed to "cooperat[e] in the placement process" (*Patricia P.* v. *Bd. of Educ.*, 203 F.3d 462, 468 (CA7 2000)) or to request review of the IEP (*Bernardsville*, 42 F.3d, at 158). There is no evidence that Congress considered the courts' policing of parental good faith to be inadequate.

In sum, nothing in the legislative history suggests that Congress intended § 1412(a)(10)(C)(ii) to replace the equitable discretion to order reimbursement already provided under § 1415, and the provisions of § 1412 ill suit the ends that *amici* speculate Congress might have been trying to achieve. Section 1412 should instead be understood to guide courts' discretion in cases that meet its criteria, leaving other reimbursement cases to be decided under the equitable considerations developed in the caselaw.

C. Section 1412 Provides Specific Criteria For Granting Or Denying Reimbursement In A Common Set Of Circumstances, So Petitioner's Supporting *Amici* Are Incorrect That Allowing Reimbursement Under § 1415 Would Render § 1412 Superfluous

Petitioner and its supporting *amici* also claim that allowing reimbursement under the general equitable authority of § 1415 would render the specific provisions of § 1412 superfluous (see NEA Br. 10; Mayors' Br. 10; City Br. 11), but that is a mistake. First, the provisions provide a predictable and standard method for a court to decide whether to grant reimbursement to a child who had previously received special education. Second, the specific provisions of § 1412 provide concise, detailed, and intelli-

gible guidance to the parents of students who have previously received special education services about when they may be entitled to reimbursement, so these provisions help such parents to evaluate their options.[14] Third, § 1412 imposes specific limits on the court's discretion to deny reimbursement on certain grounds. See, *e.g.*, § 1412(a)(10)(C)(iv)(IV) (barring court from denying reimbursement for failure to give notice where school district has not informed parents of the requirement that they give notice). A court applying § 1415 to a child who had never before received special education services could deny reimbursement for failure to give the school district notice if it believed that the equities so required, even if § 1412 would not allow reimbursement to be denied as to a child who had previously received special education.

* * *

Petitioner and its supporting *amici* claim that reimbursement and related litigation drain schools of cash. But, as this Court recognized in *Carter,* the solution lies with the schools. 510 U.S., at 15. When a state and its school districts accept IDEA funds, they accept the obligation to provide a free appropriate

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[14] The power to grant equitable reimbursement under § 1415 is limited by the extensive body of caselaw that guides courts' discretion in granting such reimbursement, so there is no basis for the contention that adding § 1412 rendered it easier for students who have not previously received special education to receive reimbursement than it is for students who have. Contra New York Br. 10; NSBA Br. 8. Furthermore, the guidance provided by § 1412 reduces parents' risk of acting rashly and never receiving reimbursement, so these provisions give parents covered by § 1412 an advantage in predictability that other parents, left to analyze the caselaw, lack.

public education to all students. Reimbursement is only an issue when the school district has failed to provide such an education to a student. "School officials who conform" to IDEA's mandate "need not worry about reimbursement claims." *Ibid.*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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